THE CONSUMER PROTECTION FROM UNFAIR TRADING REGULATIONS: A COMMENTARY.
PART FIVE

Jennifer Slade and David Grant

This is the fifth in a series of articles in which the authors examine the Consumer Protection from Unfair Trading Regulations 2008 and their impact on the travel industry in the UK.

In the last article we began a discussion of Reg. 8 of the CPR which created the general offence of knowingly or recklessly engaging in a commercial practice which contravenes the requirement of professional diligence. In this article we complete the discussion by examining the question of 'who' must have acted knowingly or recklessly to commit the offence. As in previous articles assistance can be derived from the caselaw on the Trade Descriptions Act (TDA). However it is wise to bear in mind guidance provided by Briggs J in the recent case of *Office of Fair Trading v Purely Creative Ltd & Ors* [2011] EWHC 106 (Ch), involving companies charged with breaching the CPRs, where he describes the approach courts should take to the interpretation of UK legislation which is derived from Europe:

> *Domestic regulations designed to implement EU directives, and in particular maximum harmonisation directives, must be construed as far as possible so as to implement the purposes and provisions of the directive. The interpretation of words and phrases is neither a matter of grammars nor dictionaries, nor even a matter of the use of those phrases (or of the underlying concepts) in national law. If similar words and phrases are used in the directive itself, then they must be interpreted both in the directive and in the implementing regulations by means of a process of interpretation which is independent of the member state's national law and, for that matter, independent of any other member state's national law. For that purpose the primary recourse of the national court is to the jurisprudence of the ECJ. The national court may also obtain assistance from, but is not bound by, guidance issued by the Commission, and by the decisions of other national courts as to the meaning of the relevant directive.*

Who must have acted knowingly or recklessly to commit the offence?

The state of mind of the defendant

To say that the defendant must knowingly or recklessly make a false statement requires that s/he have a particular state of mind. With most CPR prosecutions the defendants will be limited companies which do not of course have either minds or bodies. In these circumstances the rule is that a 'directing mind' of the company has to have the requisite state of mind. A directing mind means someone in the company of such seniority that he can be regarded as acting as the 'brains'

of the company. Managing directors, directors, company secretaries etc fall into this category. In a leading TDA case, *Tesco Supermarkets Ltd v Nattrass* [1972] A.C. 153, Lord Reid said that a company would only be criminally liable for the acts of:

> *'... the board of directors, the managing director and perhaps other supervisor officers of [the] company [who] carry out the functions of management and speak and act as the company.'*

Lord Diplock, in his speech, said the Articles of Association of a Company define who is the directing mind, frequently the directors of the company.

This point is made quite simply by the judge in the *Best* case discussed in Article Four [2011] TLQ 90. He said:

> *The state of the mind of the company, it is trite law to say, must be the state of mind of a person or persons who were sufficiently in control of the company to act as its mind for this purpose. It is agreed that the human person who filled that role is a gentleman named Mr Shacalis. [The managing director] For all effective purposes, Mr. Shacalis was the appellant company for the purposes of ascertaining its state of mind.*

The human person who filled that role is a gentleman named Mr Shacalis

A case going the other way is *Wings v Ellis* [1984] 1 All ER 1046. On a charge of recklessly making a false statement under s.14(1)(b) of the TDA it was said by Mann J in the Divisional Court in a decision which was not appealed:

> *In particular, we reject the respondent's suggestion that Michael Stephen-Jones, who approved the photograph and who variously called himself a 'long haul development manager' and 'the contracts manager', could be inferred to be a member of the relevant class.* [i.e. the directing minds of the company]

Thus if no one sufficiently senior in the company acted knowingly or recklessly then the company cannot be convicted. That at least is the theory. However, case law has made inroads into this principle. In *Wings v Ellis* when it came to the House of Lords it was decided that so long as the directing mind of the company knows the statement is false there is no requirement that there be knowledge of it being made. Lord Scarman said:

> *The day-to-day business activities of large enterprises, whatever their legal structure, are necessarily conducted by their employees, and particularly by their sales staff. It follows that many of the acts prohibited by the Act will be the acts of employees done in the course of the trade or business and without the knowledge at the time of those who direct the business. It will become clear that the Act does cover such acts.*

Yugotours Ltd v Wadsley [1988] Crim LR 623, a case involving a prosecution under s.14(1)(b) for recklessly making a false statement the court came close to dispensing with the requirement of *mens rea* altogether (see the first edition of 'Holiday Law, Grant & Mason, 1997 pp.287-289 for a full discussion of the case) but in *Airtours v Shipley* (1994) 158 JPN 319 (DC) this view was rejected. The facts were that Airtours had featured a hotel in one of their brochures that was said to have an indoor swimming pool. This was not the case. The hotel did not have and never had had an indoor swimming pool. Airtours conceded that the false statement had somehow crept into the brochure because of a mistake at

head office—which they could not explain. This was despite an errata policy which the court described as an 'excellent system'. (See Cooper, *Due Diligence—The Tour Operator's View* [1994] TLJ 11 for a discussion of errata systems.) The errata policy, although devised by the directing minds of Airtours, was operated by middle management who were directly responsible to the directors.

A prosecution under s.14(1)(b) for recklessly making a false statement succeeded in the magistrates' court. The magistrates said that although Mrs Bryan, the Overseas Operations Controller at Airtours responsible for the brochure, was not one of the directing minds of the company nevertheless the company could be convicted because the directors had 'delegated' their functions to her. In other words she became the directing mind of the company for this purpose.

The case decided that no delegation had taken place

However on appeal to the Divisional Court the decision was overturned. The court said that the justices reliance on a theory of delegation was based upon a selective reading of the judgments in *Tesco v Nattrass* [1971] 2 All ER 127. Although it is perfectly possible for a board of directors to delegate its functions to others, and *Tesco v Nattrass* confirms this, the case actually decided that on the facts no delegation had taken place. The Divisional Court preferred to adopt the reasoning from the *Tesco* case that concluded there was no delegation. McCowan LJ in the Divisional Court quoted the following passage by Lord Morris from the *Tesco* case:

> *My Lords, with respect, I do not think that there was any feature of delegation in the present case. The company had its responsibilities in regard to taking all reasonable precautions and exercising all due diligence. The careful and effective discharge of those responsibilities required the directing mind and will of the company. A system had to be created which could rationally be said to be so designed that the commission of offences would be avoided. There was no such delegation to the manager of a particular store. He did not function as the directing mind or will of the company. His duties as the manager of one store did not involve managing the company. He was one who was being directed. He was one who was employed but he was not a delegate to whom the company passed on its responsibilities. He had certain duties which were the result of the taking by the company of all reasonable precautions and of the exercising by the company of all due diligence. He was a person under the control of the company. He was, so to speak, a cog in the machine which was devised: it was not left to him to devise it.*

He also adopted the skeleton argument put up by counsel for Airtours:

> *It is contended by the appellant that Mrs Bryan only had a discretion to produce the holiday brochure in question and that such a discretion was limited by the errata policy of checking for mistakes set up by the directors. The directors of the appellant company had, therefore, not delegated their authority to run and manage the appellant company but had simply employed Mrs Bryan to produce a holiday brochure within set guidelines and procedures. Mrs Bryan had not been given full discretion to act independently of instruction from the directors but had been given a measure of discretion to produce the holiday brochure in question within the framework of instructions embraced by the errata policy document.*

> *The directors of the appellant company simply, therefore, employed Mrs Bryan to work within a system that had been created and designed so that the commission of offences would be avoided. Her duties did not involve managing the company but preparing a company brochure. She was, so to speak, a cog in the machine which was devised and it was not left to her to devise it.*

Thus Airtours were not guilty on the grounds that any recklessness that occurred was not that of the directing minds of the company or anyone to whom they had delegated any authority to manage the company. The company itself was not reckless because by setting up a proper errata system and ensuring that it operated effectively they were having regard to the truth or falsity of the statements in the brochure (s.14(2)(b)).

The reasoning was a radical departure from principle and authority

On the question of the *Yugotours* case although the court was unable to overrule that decision it went out of its way to cast doubt on its authority. It suggested that the reasoning was a 'radical departure from principle and authority'. It also said that insofar as it cast doubt on the decision of Mann J on the issue of recklessness in the *Wings* case it was also wrong. (See Bragg 'Recklessness and Authority' [1996] TLJ 97 for a discussion of the *Airtours* case.)

Looking beyond the narrow confines of travel law and the TDA for assistance on this question of attributing the knowledge of senior managers to their companies the problem was examined in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 by the Privy Council. They said that whether there could be such attribution depended upon the interpretation to be placed upon the statute imposing liability and the policy it sought to achieve and that different statutes might treat the actions of employees differently. However on the issue of the TDA they seemed content with the approach adopted by the House of Lords in the *Tesco* case.

If we apply this caselaw to the CPR what would be the outcome? Would there be a conviction in *Airtours v Shipley* under Reg. 8 if the facts were to re-occur today? Could the directing minds of the company be said to be 'recklessly' engaging in a commercial practice which contravened the requirements of professional diligence? If, as in the *Airtours* case, the directors had devised an 'excellent' errata system, designed to eliminate brochure errors if operated properly, and a lowly employee, a mere 'cog in the machine', had failed to follow the system correctly then it is difficult to see how the company could be convicted. Put another way, the directors would have had regard to whether the company was engaging in a commercial practice which contravened the requirements of professional diligence.

Of course if the directors had not devised an errata system at all then the company would be guilty of an offence because then there would have been no regard to whether the company was engaging in a commercial practice which contravened the requirements of professional diligence.

Jennifer Slade is a Senior Lecturer in Law at Northumbria University
David Grant is Co-editor of the Travel Law Quarterly